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Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 141.

THE UNITED STATES, PETITIONER,
v.
FACTORS & FINANCE COMPANY.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENT

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BRIEF FOR FACTORS & FINANCE COMPANY.

OPINION BELOW.

The opinion of the Court of Claims (R. 21) is reported in 56 Fed. (2d) 902, and in 73 C. Cls. 707.

QUESTION PRESENTED.

Respondent respectfully submits that the petitioner's statement of the question presented does not fully and adequately present the specific question arising upon this record. Upon the record in this case, the following is the real question presented:

Within the statutory period for filing claims for refund, respondent duly filed a claim for refund on Treasury Form 843 specifying the year and the amount claimed and stating that its tax liability had not been finally passed upon by the Commissioner, and that its claim was filed in order to save the taxpayer's rights under the pertinent statutes governing refunds of taxes and in order to permit the Commissioner to refund any excess paid over taxes actually found to be due. After the period for filing claims had expired, *but before the Commissioner had considered or passed upon its claim, and while*

the claim was still pending and awaiting consideration, respondent filed with the Commissioner an amendment and amplification of its claim for refund, specifically so designated, which set forth fully and completely the grounds relied upon and the data in support thereof. *Thereafter, the Commissioner took up the claim as amended for consideration*, held hearing thereon, determined that respondent had overpaid its taxes in the amount of $32,634.89, and in writing advised respondent to that effect. Thereafter, the Commission refunded to respondent $12,639.45, but refused to refund the balance of $19,995.44. The question is whether, in the circumstances of this case, a claim for refund, timely filed, for a specific year, for a specific amount, but which does not set forth the specific items causing an overpayment, could be amended and amplified *before the Commissioner had considered it or acted upon it*, so as fully to set forth all the facts and grounds in support of its claim for the overpayment determined by the Commissioner, and so as to enable it to maintain its suit for the recovery of the amount so allowed by the Commissioner.

STATUTES AND REGULATIONS INVOLVED.

The applicable provisions of the statutes and regulations involved are set forth in Appendix A (*infra*, p. 36).

STATEMENT.

The "Statement" contained in petitioner's brief purporting to be a summary of the facts found by the Court below, appears to be inadequate for a proper consideration of this cause, for the reason that certain facts found by the Court below, which are pertinent, material and significant to the issue herein, are omitted therefrom.

In stating the facts in his brief, the respondent has followed the narrative of petitioner, but has added thereto the additional findings of the Court below, which are deemed material, pertinent and significant herein. In order that attention may be drawn to those additional findings of the Court, the respondent has caused them to be italicized. The statement is as follows:

Respondent sued in the Court of Claims to recover an overpayment of $19,955.44 of income and excess profits taxes for the year 1917.

The Court of Claims found, among others, the following facts (R. 17–21):

June 15, 1918, plaintiff (respondent here) duly filed its income and profits tax returns for the calendar year 1917, and on or about that date paid to the collector the tax of $177,338.72 shown thereon. In May, 1920, the Commissioner assessed an additional tax of $267.32, which was paid June 29, 1920. In August, 1920, a further assessment of an additional tax of $25,327.91 for 1917, was made. In October, 1920, plaintiff paid $9,388.57 thereof and filed a claim for abatement of the balance of $15,933.34 (R. 17, Findings 2). In May, 1921, the Commissioner ordered an examination of the taxpayer's affairs and such examination was made and report thereon filed in August, 1922. This examination and report was made in connection with plaintiff's claim for abatement (R. 17, Findings 3). In January, 1923, the Commissioner advised the plaintiff that it had been over-assessed for the year 1917, and on February 9, 1923, plaintiff filed a brief with the Commissioner excepting to the proposed overassessment (R. 17–18, Findings 4).

February 27, 1923, *before the Commissioner of Internal Revenue had made and notified the plaintiff of his final determination in connection with his audit of plaintiff's tax liability for 1917 and of his final action on the claim for abatement*, plaintiff filed with the Collector of Internal Revenue for Rhode Island a claim for refund of $177,606.04 for the year 1917.[1] *This claim filed on Treasury Form 843 recited the amount claimed to be refundable and that said amount had theretofore been paid on June 15, 1918, and June 30, 1920. The claim was under oath and set forth that it was filed for the purpose of enabling the Com-*

[1]In the transcript of record in this Court, at page 11 thereof, the said claim for refund is incorrectly reproduced in that the amount claimed in the refund in item 6 is left blank. The Record below, in Exhibit A, which is made a part of the findings by reference in paragraph 5 of the Court's Findings of Fact, shows that the refund claim set forth in item 6 the amount to be refunded as $177,606.04. Exhibit A in its correct form is reproduced herein as Appendix B (*infra*, p. 39).

missioner to refund to the taxpayer any amount of taxes paid by it on account of the income and profits taxes for 1917 in excess of its true liability for that year, and that the true tax liability had not been finally determined by the Commissioner. The claim also stated that "claimant's taxes for 1917 have not been finally passed upon by the Commissioner of Internal Revenue. This claim for refund is filed in order to save the taxpayer's right under the pertinent statutes covering abatements, credits, and refunds of income and excess-profits taxes for 1917, and to permit the Commissioner to refund to deponent any excess paid over taxes actually found to be due." This claim for refund was received by the Commissioner on March 20, 1923 (R. 18, Finding 5, also R. 11–12, Ex. A). *Before receipt of the claim for refund, the Commissioner had considered, audited, and reviewed the abatement claim* filed October 2, 1920, and had made certain adjustments in the 1917 tax liability resulting in the determination of an overassessment of $3,293.89. *These determinations and adjustments were in connection with the claim in abatement and were predicated upon the report of the internal revenue agent, made in connection with the abatement claim and upon statements submitted by the taxpayer in support of its claim for abatement of $15,933.34.* In November, 1923, a certificate of overassessment was sent to the plaintiff.

Upon receipt of said certificate of overassessment, plaintiff paid the balance of the taxes alleged to be due by the certificate of overassessment in the amount of $12,639.45, together with interest of $3,028.24. *The total tax paid by plaintiff for the calendar year 1917, representing original and additional assessments, amounted to $199,634.06, together with accrued interest of $3,028.24. The true and correct tax liability of the plaintiff on account of the income and excess profits tax for the calendar year 1917, under and pursuant to the pertinent provisions of the Revenue Act of 1917, was $166,999.17, being $32,634.89 less than the amount paid by the plaintiff, as aforesaid* (R. 18–19, Finding 6).

The Commissioner in his audit and consideration of plaintiff's claim for abatement, as aforesaid, did not consider or act upon the claim for refund filed February 27, 1923 (R. 18, last paragraph of Finding 5). *The Commissioner of Internal Revenue took no*

action with reference to the consideration or determination, prior to July 17, 1925, relative to the claim for refund filed February 27, 1923, or as to its allowance or its rejection (R. 19, first paragraph of Finding 7).[2]

On July 17, 1925, *and prior to any action being taken upon, or consideration or determination given to, the claim filed February 27, 1923, plaintiff duly filed with the Collector an amendment to its claim for refund of February 27, 1923, in amplification thereof.*[3] *In this amendment and amplification plaintiff stated, and specified, that its true tax liability should be determined pursuant to the provisions of Section 210 of the Revenue Act of 1917, which section provided that if the invested capital could not be satisfactorily determined, the profits tax should be computed in a certain manner. It asked that its claim theretofore filed February 27, 1923, be allowed in the amount claimed therein. The amendment and amplification calling the attention of the Commissioner to the pertinent provisions of existing law applicable to the plaintiff's claim for refund, and under which it was entitled to have its true tax liability computed and determined, likewise contained a statement of facts and certain data compiled from the income and profits tax returns for 1917 theretofore filed by the taxpayer.*[4] *The amendment also contained the statement that*

[2]Attention is respectfully directed to the statement of petitioner, at page 3 of his brief, stated to be a summary of the "facts found by the Court of Claims," that "the February, 1923, claim for refund was neither specifically allowed or rejected." Petitioner's statement is so phrased as to cause it to appear that the Court of Claims had found that the claim had been in effect rejected although not specifically rejected. The Finding of the Court is specifically to the contrary. The Court found as a fact that the Commissioner did *not* consider or act upon the refund claim, in his action upon the abatement claim, and that at no time prior to July 17, 1925, did the Commissioner take any action by way of consideration or determination of the refund claim, either as to its allowance or its rejection (R. 19, first paragraph of Finding 7).

[3]Attention is respectfully invited to the statement of petitioner, at page 3 of his brief, stated to be a summary of the "facts found by the Court of Claims," that "*respondent filed what was termed an amendment to and amplification of the previous claim.*" (Italics supplied.) The Court did NOT so find. The Court specifically found as a fact that the second claim was an amendment to, and amplification of, respondent's refund claim of February 27, 1923.

[4]Attention is called to the amendment and amplification at R. 12–14, showing that the data and information furnished the Commissioner therein were compiled from tax returns and documents *already* in the hands of the Commissioner of Internal Revenue. The amplification filed on July 17, 1925, is set out in Appendix C hereto.

"before the tolling of the statute of limitations for 1917 taxes and on or about February 27, 1923, taxpayer filed a 1917 claim for refund for the full amount of the 1917 tax paid, $177,606.04, and this document is merely the amplification of said claim, setting forth the details in the matter" (R. 19, Finding 7).

Thereafter, the Commissioner entered upon a consideration of the claim for refund and in connection therewith considered the amendment or amplification thereof filed July 17, 1925, and advised the taxpayer that a conference upon the claim would be held in the Commissioner's office on June 22, 1926, and that "all of the evidence as to law and facts, which you desire to have considered by the bureau in the final determination of the abnormality or abnormalities alleged, must therefore be submitted at once or as far in advance as possible of the date above fixed, in order that the fullest consideration may be given thereto." Thereafter, a hearing was held on June 22, 1926, in the office of the Commissioner at which plaintiff appeared and submitted evidence and data in support of his claim for refund (R. 19–20, Finding 7).

Thereupon the Commissioner considered plaintiff's original and amended claims for refund and the evidence in support thereof and held that the profits tax for 1917 should be computed under Section 210 of the 1917 Act. *Accordingly, he determined* that the true tax liability of the plaintiff for 1917 was $166,999.17, instead of $202,727.95, as theretofore assessed, and instead of $199,634.06 as theretofore collected. *The Commissioner therefore determined that plaintiff had paid as taxes $32,634.89 in excess of the true amount of tax due for 1917.* Accordingly, on January 13, 1927, the Commissioner advised plaintiff *by letter that "after a careful review of your protest and of all the evidence submitted in support of your contentions in a conference held in this office on June 22, 1926, you are advised that the bureau holds that your profits tax for the year 1917 should be computed under" Section 210 of the 1917 Act, and computed an overpayment of $32,634.89.* In the same letter the Commissioner notified the taxpayer that $19,995.44 of the determined overassessment and overpayment was barred from refund because the claim for refund of February 27, 1923, did not ask for special assessment, and *"your claim for refund filed July 18, 1925, amplifying*

the former claim" was not filed within the statutory period (R. 20, Finding 8; R. 14–16, Ex. C).

Thereafter, on April 8, 1927, the Commissioner executed and forwarded to taxpayer a formal certificate of overassessment on Treasury Form 776–C, setting forth the true tax to be $166,999.17 and the collections made in excess of the true tax to be $32,634.89 (R. 20–21). The said certificate of overassessment stated to the taxpayer: "Sirs: An audit of your income tax return, Forms 1031 and 1120, and a consideration of all the claims (if any) filed by you for the year 1917 indicates" the overpayment of $32,634.89 (Ex. R. incorporated by reference at R. top p. 21).

On June 21, 1927, the Commissioner refunded $12,639.45 of the overpayment of $32,634.89 but refused to refund the balance of $19,996.44 (R. 21, Finding 10). The Court of Claims gave judgment for the respondent (R. 26).

SUMMARY OF ARGUMENT.

A claim for refund is a claim or demand for the return of taxes overpaid. The issue raised by such a claim is whether there has been an overpayment, and, if so, the amount thereof. The reasons supporting a claim are in effect the evidence informing the Commissioner of the grounds for its allowance, which information is necessary for the determination of the issue raised by the claim. If the claim be timely filed, and the reasons, the grounds, and the information are supplied to the Commissioner before his consideration of the issue raised by the claim, and upon consideration thereof the issue is determined by finding there is an overpayment of tax, a suit may be maintained to recover such overpayment.

The rule is that a refund claim puts the Commissioner on notice that a demand is being made for the return of taxes overpaid, and that it is the duty of the claimant, before the Commissioner makes his determination thereon, to advise the Commissioner as to the reasons why the claim should be allowed so that the Commissioner may not be misled.

The rule is that a refund claim which is complete on its face, or which is made complete before it is considered or finally

acted upon, will support a repayment and a suit to enforce repayment.

The rule is that a refund claim which notifies the Commissioner that demand is made for the repayment of a specific amount, representing specific taxes overpaid, and for a specific year, may be amended or amplified prior to final determination thereon by the Commissioner, and that when the Commissioner considers the claim in light of all the information contained in the amendment, such amendment is not too late even though made after the time when the claim itself could have been filed.

The statute requires only that a claim shall be filed. The regulations provided that "the facts relied upon in support of the claim should be clearly set forth under oath." The regulations did not provide that all the reasons and the facts supporting the claim should be contained in the face of the claim. The amendment of the regulations made effective on May 1, 1929, is prospective only and clearly indicates that the regulations before that date did not require the claim to contain on its face the reasons and facts supporting the claim. The obvious intent of the regulations applicable here was to provide that the reasons and facts supporting the claim should be placed before the Commissioner to enable him to pass intelligently on the claim. Such matters were evidentiary and the time of the filing thereof was not of the essence.

In the instant case a refund claim was filed under oath on Form 843. It set forth the amount claimed, the kind of taxes overpaid, the year for which claim was made, and demanded the refund of a specific amount. It explained on its face why the grounds were not at that time more fully set out. The time for filing was about to expire, the Commissioner was examining respondent's records, and taxpayer was trying to preserve its rights. Later, when the Commissioner had determined its income and invested capital, taxpayer amended and amplified its claim by setting forth under oath, also on Form 843, all the facts relied upon in support of its claim. Ten months thereafter, the Commissioner advised taxpayer he would conduct a hearing on the claim. Hearing was held. Thereafter, the Commissioner considered the claim in light of its amendment and in light of all the facts submitted in support

of the claim and determined an overpayment of $32,634.89. He thereupon issued a certificate of overassessment in that amount.

Respondent's refund claim was timely filed and was properly amended so as fully to inform the Commissioner of all the reasons and facts relied upon in support of its claim. The Commissioner's action upon an abatement claim in November, 1923, did not constitute a rejection of respondent's refund claim; and the amplification and amendment of July 17, 1927, did not constitute the only refund claim in this matter.

A claim for refund is not intended as a means of preventing the repayment of taxes erroneously or illegally collected, but is intended as a method for enabling such overpayments to be refunded. The statutory provisions for refund claims are relief provisions and they should not be construed in such a manner as to prevent the relief which was intended to be afforded by them.

No new principle of law is involved herein. The Court below applied the general principles to the facts in this case and its application thereof was proper under all the circumstances of this case.

The cases cited by petitioner in his brief do not support his position herein. To the extent such cases are pertinent here, they support respondent's position.

The Judgment of the Court below was a just and proper Judgment and should not be reversed.

ARGUMENT.

THE REFUND CLAIM HEREIN IS SUFFICIENT TO SUPPORT THE REFUND DEMANDED AND TO MAINTAIN SUIT THEREFOR.

The Refund Claim was Duly Filed.

On February 27, 1923, respondent filed with the Collector of Internal Revenue of Rhode Island a claim for refund of $177,606.04 for 1917 (R. 18). At the time of the filing, the Revenue Act of 1921 was in effect. Section 252 of that Act provides that a refund shall be made if claim therefor was filed within five years after the return was due. Since the return was for the calendar year 1917, the return was due March 15, 1918. Five years from that date expired on March 15, 1923. The claim, therefore, was clearly filed within five years after the return was due, and the filing was timely. The Government does not deny this fact.

A Refund Claim Gives the Commissioner Jurisdiction to Grant a Refund.

Section 284 (a) and 284 (b) of the Revenue Act of 1926 constitute the Commissioner's authority (and mandate) to refund overpayments of income and profits taxes if claim therefor has been timely filed by the taxpayer.

A claim for refund is a claim or demand for the return of specific taxes in a specified amount overpaid for a specific year. Such a claim puts the Commissioner upon notice that a refund of such taxes is demanded and raises the issue as to such overpayment and the amount thereof. The tax liability of the claimant is thrown into issue. *Lewis* v. *Reynolds*, —— U. S. ——, 76 L. Ed. 224, 52 Sup. Ct. 145, affirming and quoting the pertinent portion of the opinion below in 48 Fed. (2d) 515. *Union & N. H. Tr. Co.* v. *Eaton*, 20 F. (2d) 419; *Warner* v. *Walsh*, 24 F. (2d) 449. See also cases cited by Court below in the instant cause (R. 25). The Treasury Department and the Bureau of Internal Revenue have repeatedly ruled that the issue involved in any tax case is whether or not the tax has

been overpaid. T. D. 3251, 5 C. B. 245; L. O. 1080, 5 C. B. 246; G. C. M. 9800, C. B. X–2, p. 271.

When a taxpayer timely files a claim for refund, the Commissioner is thereby empowered to do at least three things:

(1) He may determine, upon any grounds which he deems proper, that there has been an overpayment and advise the taxpayer that the claim has been allowed, and forthwith send a check for refund. *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258. This action may be taken whether or not all the facts supporting the claim appear in the face of the claim. The facts, upon which he made his determination, may be those in the Commissioner's own files. If he has a claim before him, he has the jurisdiction to make the refund. This Court will probably take judicial notice that such action by the Commissioner is of daily occurrence in the Bureau.

(2) He may consider the claim and find that he is without information sufficient to enable him to allow the claim. In such case, he may reject the claim, schedule the rejection, and notify the taxpayer that the claim is insufficient to support a refund. In such case, the taxpayer is without remedy (if the statute within which claim may be made has expired) because he can not force the Commissioner to reexamine his claim and he can not maintain a suit because the grounds therefor had not been furnished to the Commissioner.

(3) Prior to acting upon the claim, the Commissioner may receive from the taxpayer at the latter's initiative and/or he may call upon the taxpayer for facts or information, and upon receipt of such facts, may take up the claim for consideration in light of the facts which are all before him. If upon consideration of the claim, with all the facts thus before him, he determines favorably to the claimant, but refuses to pay the claim, a suit will lie to recover the amount determined to be refundable even though the facts were so laid before the Commissioner after the date when the original claim could have been filed. And it is quite immaterial that some of the facts, as in the instant case, were supplied by the respondent on a second Form 843.

The third alternative above is the situation presented in the instant case.

A Timely Refund Claim, Before its Rejection by the Commissioner, May be Amplified and Amended, so as to Support Refund and Suit Therefor.

The rule, now so general as to be practically universal, is that a claim which is amended prior to its consideration and final determination, and in time to place before the Commissioner all the facts relied upon in its support, is sufficient to support the refund and a suit for its recovery. *Tucker* v. *Alexander*, 275 U. S. 228; *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258; *McKesson & Robbins Inc.* v. *Edwards*, (C. C. A. 2d) 57 Fed. (2d) 147; *Lehigh & Wilkes Barre Coal Co.* v. *U. S.*, 38 Fed. (2d) 637; *Lasher* v. *U. S.*, 65 C. Cls. 295.

The taxpayer may, therefore, so long as his claim is undecided and pending, file with the Commissioner, under oath, a statement of all the facts relied upon in support of the claim.

The Commissioner having had before him, at the time when he considered the instant claim and determined the overpayment, all the facts in support of the claim, submitted under oath, the respondent may properly maintain this action for the recovery of the amount so determined to have been overpaid.

Neither the Statute nor the Regulations Required the Facts Submitted in Support of a Claim to be Contained on the Face of the Claim itself.

The *statute* makes no provision for the filing of anything but a claim. The content of the claim is not specified. *Union & N. H. Tr. Co.* v. *Eaton*, 20 F. (2d) 419, 421; *Warner* v. *Walsh*, 24 F. (2d) 449, 450; *Wunderle* v. *McCaughn*, 38 F. (2d) 258, 260. The provision as to all facts being stated in support of the claim is a provision by *regulation only* A regulation can interpret the statute only to the extent that it does not invade the legislative field and add to or subtract from the statute. In other words, a regulation is valid only if it is a reasonable regulation, *i. e.*, one designed to further the purposes of the statutory enactment. The question arises as to the reasonableness of the regulation in question. It can be held reasonable only to the extent that it furthers the purpose of the statute as outlined by this Court, in the cases hereinafter referred to. If it does not do that, it is an unreasonable regulation.

Precisely what were the provisions of the pertinent regulation?

Regulation 62, Article 1036, provided: "*Claims* by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843." (Italics supplied.) That is the only provision in the regulation referring to "claims." That regulation is consonant with the statute and is reasonable. Not one word is said in the regulation as to the content of the "claim." Apparently the Treasury Department was aware that an attempt to add to the legislative enactment by stating what the claim should contain, might be invalid.

Two sentences further down in the regulation it is provided: "All the *facts* relied upon in support of the *claim should* be clearly set forth under oath." (Italics supplied.) Nowhere in the regulation is there a statement, even by implication, that "all the facts" must be set out *in the claim*. The words "facts" and "claim" are used in the same sentence and obviously are not used as synonymous. If it had been the intent to regulate the claim, as the Government here contends, the obvious expression would have been "All the facts relied upon in support of the claim should be clearly set forth *in the claim*," or "The claim shall contain all the facts relied upon in support of it and the facts shall be stated under oath." It would appear clear that the regulation means only that the facts which are to be brought before the Commissioner in support of a refund claim must be clearly stated and be under oath. There is nothing in the regulation to give color to the contention that such facts can not be stated in a different document than the claim, or that the facts relied upon are not in support *of the claim* because they be filed at a different time from that of filing the claim. The instant petitioner would invoke a construction which would require that all the facts in support of the claim must be set forth on the face of the claim itself. Such a construction (not of the statute but the regulation in force at that time) would not be a liberal construction and would not be a construction tending to give the relief which the relief provisions of the statute were intended to give.

The action of the Secretary of the Treasury on March 27, 1928, discloses that the prior regulations did not require, and

were not intended to require, that all the facts submitted in support of a refund claim should be contained on the face of the claim. On March 27, 1929, the Secretary of the Treasury promulgated Treasury Decision 4265, C. B. VIII–1, page 110. This special Treasury Decision was an amendment to existing regulations. It is set out in Appendix A, *infra*. It will be noted that this Treasury Decision provides that although a claim will not be considered defective solely by reason of the fact that it is not made on the prescribed *form*, yet it will be deemed defective unless each ground upon which the refund is claimed is set forth in detail in the claim. It will be further noted that the Treasury Decision concludes with the statement that, "these regulations shall take effect on May 1, 1929, and *shall be applicable to all claims filed on or after such date*, and all other regulations are modified in so far as they are inconsistent with these regulations" (italics supplied). The language of the Treasury Decision is an amendment to existing regulations, and the amendment is specifically made prospective and not retroactive, and such amendment became effective on May 1, 1929. It is obvious that if the regulations had theretofore required that the details submitted in support of the claim should be contained in the face of the claim, the amendment contained in T. D. 4265 would not have been necessary. The effort of petitioner in the instant case is to construe the regulations in force from 1921 to May 1, 1929, as though T. D. 4265 had been in full force and effect throughout the period.

The second paragraph of T. D. 4265 is likewise pertinent. That paragraph provides that from and after May 1, 1929, amendments to a refund claim must be made within the statutory period provided for filing the claim itself. This recognizes the fact that such was not the regulation theretofore. The fact that it was necessary to amend the regulations so as to confine amendments to the time within which claims could be filed, shows that such was not the rule under the regulations prior to T. D. 4265. It has been heretofore noted that the *statute* makes no provision relative to the contents of a refund claim. The only regulation which provides for the contents of a refund claim is contained in T. D. 4265. Whether or not T. D. 4265 is consonant with the law is not pertinent here.

Whether consonant with law or not, it discloses clearly that before the promulgation of T. D. 4265 the regulations did not require that the details submitted in support of a claim must be contained in the face of the claim, or that amendments to a refund claim must be made prior to the expiration of the statutory period for filing the claim.

The Court's attention is invited to page 6 of petitioner's brief, wherein he states that taxpayer's claim was filed on February 27, 1923. He then says: "This was made out on Treasury Form 843 but it did not set forth any supporting facts as required by the regulations." The statement is erroneous in saying that it did not set forth any supporting facts. The Court will observe this error upon reading the Claim (R. 11-12). The statement is further erroneous in stating that the regulations required that the refund claim filed February 27, 1923, should contain the facts relied upon in support of the claim. It is important to note that *petitioner does NOT say* that the claimant failed *to set forth under oath all the facts relied upon in support of its claim.* Petitioner *does NOT* deny that the claimant set forth all the facts in support of its claim, and that such facts were filed with the Commissioner before the Commissioner acted upon the claim.

Petitioner's position herein is predicated on the sole fact that the claim of February 27, 1923, did not contain on its face all the evidentiary matter which was later submitted, under oath, to the Commissioner. Petitioner does not deny that such matter was so submitted prior to the time the Commissioner took up the claim for consideration, action or determination, or that such matters were considered by the Commissioner in reaching his determination on the claim.

In light of the foregoing, and of T. D. 4265, it is apparent that petitioner's position in the instant case is not supported by the statute or the applicable regulations.

The Court below pointed out the difference in the requirements for a refund claim which would support a refund by the Commissioner, and one which would support an action in court

to enforce payment. The law is clear that in order for a claimmant to maintain suit upon his claim the Commissioner of Internal Revenue must be advised of the grounds upon which claimant relies before the Commissioner makes his determination on the claim.

The facts in this record and the findings of the Court establish that before the Commissioner considered or passed upon the instant refund claim, he had before him all the facts, circumstances and reasons advanced by the claimant in support of its claim.

Petitioner seeks to avoid the application of the well established rule by two assumptions, both of which are contrary to the facts of record and contrary to the findings of fact by the Court. The petitioner first bases an argument on the assumption that there was a rejection of respondent's refund claim prior to the time of its amendment and amplification. The second assumption is that the amendment and amplification of the claim was not an amendment or amplification at all, but was a new and independent claim having no relation to the claim filed on February 27, 1923.

As stated above, both of these assumptions by the petitioner are contrary to the facts established in this case and found by the Court. A discussion of these assumptions of the petitioner will follow next hereinafter.

There Was No Rejection of the Claim and the Amplification and Amendment Thereof did not Constitute a New and Original Claim.

The petitioner assumes, contrary to the record, that the respondent's refund claim of February 27, 1923, had been rejected by the Commissioner prior to the filing of the amendment or amplification. This erroneous assumption of petitioner appears on page 7 of his brief, wherein he alleges that, "in effect," the Commissioner's action in November, 1923, on an *abatement* claim constituted a rejection of the claim for refund. *This contention is made for the first time by petitioner in his brief filed in this Court.* In this contention, petitioner has ignored the findings of fact made by the Court of Claims.

The Court below specifically found as a fact that such was not the case.

The last sentence in Finding 5 (R. near bot. p. 18) states:

> "The Commissioner in his audit and consideration of plaintiff's claim for abatement, as aforesaid, did not consider or act upon the claim for refund filed February 27, 1923."

Again, in the first sentence in Finding 7 (R. p. 19), the Court found:

> "The Commissioner of Internal Revenue took no action with reference to the consideration or determination prior to July 17, 1925, relative to the claim for refund filed February 27, 1923, or as to its allowance or its rejection."

In the second paragraph of Finding 7 (R. 19) the Court found:

> "On July 17, 1925, *and prior to any action being taken upon, or consideration or determination given to, the claim filed February 27, 1923*, plaintiff duly filed with the collector an amendment to its claim for refund of February 27, 1923, in amplification thereof." (Italics supplied.)

Again the Court said (R. 22):

> "The Commissioner did not consider or act upon plaintiff's claim for refund in connection with his consideration of the abatement claim."

There is ample evidence in the record to support the Court's findings. Exhibits "M" and "N" are made a part of the Court's findings by reference (R. bot. 19, top 20). The facts disclosed are these: Taxpayer amended and amplified its claim on July 17, 1925. The Commissioner took no action in regard to it until about ten months had elapsed. Then, on April 30, 1926, he wrote claimant that he proposed to reject the claim because no evidence had been submitted (Ex. M). The taxpayer replied (Ex. N) on May 8, 1926, and called the Commissioner's attention to the fact that *all the facts and*

data had been submitted nearly a year previously. Thereupon, on May 14, 1926, the Commissioner advised the claimant that a conference and hearing would be held on the claim. On June 22, 1926, the hearing was held and was the only hearing ever held on the taxpayer's refund claim. This was over three years after the claim for refund was filed and was about a year after it had been amplified and amended, and about a year after all the facts in support of the claim had been set forth under oath.

Respondent submits that an inference or assumption that the Commissioner had rejected the refund claim by his action on the abatement claim is unwarranted and unfounded in fact, and is contrary to the specific finding of the Court below. The effect of such an assumption would be to have the Commissioner reject a refund claim "unbeknownst to himself."

Respondent is not aware of the pertinence of the citation of *Hart Glass Mfg. Co.* v. *U. S.* 73 C. Cls. 32, 48 F. (2d) 435. It apparently has no bearing on the point for which it appears to be cited. The petitioner argues that the action of the Commissioner in November, 1923, upon an abatement claim (which was for the abatement of an unpaid assessment) was a rejection of a refund claim for the repayment of overpaid taxes, which claim was not then under consideration by him. Respondent does not see that *Hart Glass Mfg. Co.* v. *U. S.*, *supra*, in any wise bears on the argument on that point.

Based upon his assumption above discussed, the petitioner argues that since the claim for refund had been rejected, there was nothing to amend, and hence the formal amendment and amplification filed July 17, 1925, must stand alone and constitute the only claim in the case. Petitioner's argument on this point is likewise in conflict with the facts found by the Court below, and in conflict with the Commissioner's own statement of his understanding of the amendment, and in conflict with the statement on the face of the amendment itself.

The Court found these facts:

> On July 17, 1925 * * * plaintiff duly filed with the collector *an amendment to its claim for refund of February*

27, 1923, in amplification thereof. In this *amendment and amplification* plaintiff stated, and specified * * * [and] asks that *its claim theretofore filed February 27, 1923*, be allowed in the amount therein claimed. The *amendment and amplification* * * * contained a statement of facts and certain data compiled from the income and profits tax returns for 1917 theretofore filed by the taxpayer. The *amendment* also contained the statement that "Before the tolling of the statute of limitations for 1917 taxes and on or about February 27, 1923, taxpayer filed a 1917 refund claim for the full amount of the 1917 tax paid, $177,606.04, and this document is merely the amplification of said claim setting forth the details in the matter." * * * Thereafter, the Commissioner entered upon a consideration *of the claim for refund* and *in connection therewith* considered the *amendment or amplification thereof filed July 17, 1925* * * * (R. 19.)

Thereupon, the Commissioner of Internal Revenue considered plaintiff's *original and amended claims* for refund and the evidence in support thereof * * *. (Italics supplied.)

Again, the Court said:

On July 17, 1925, * * * plaintiff prepared on the standard Treasury form and duly filed a claim for refund *as an amendment and amplification of the earlier claim.* The *amended claim* set forth specifically * * *. The Commissioner took up the consideration of *these claims.* Evidence in support of *the claims* was furnished by the plaintiff and hearings were held in the Commissioner's office * * *. (R. 22.) (Italics supplied.)

The Court further stated:

The *Commissioner of Internal Revenue* in his letter to the plaintiff of January 13, 1927, * * * *referred to the claim of July 17, 1925*, as "*amplifying the former claim.*" (R. 24.) (Italics supplied.)

In the face of the facts of record, the findings of fact made by the Court, and the Commissioner's own recognition of an *amplification of the former claim*, it would appear that petitioner's argument that the amendment of July 17, 1925, was an independent claim and the only existing claim in the case, is without factual warrant or foundation.

The Claim Filed February 27, 1923, was Properly Amplified under the Statute and the Regulations.

Continuing his erroneous assumption, the petitioner argues that the situation presented to this Court is similar to that presented by an amended declaration which seeks to set up a new cause of action or to bring in new parties.

In support of his argument, petitioner cites certain cases at bottom of page 9 and top of page 10 of his brief. These cases hold that in a law action an amendment, which sets up a new cause of action or brings in new parties, comes too late when filed after the statutory period for instituting the suit has expired. That principle is so well recognized as to need no citation of authority in its support. Those cases do not hold that an amendment to the original cause of action, which sets forth additional reasons and facts in support of the pending cause of action, may not be filed after the institution of the suit is barred. The amplification and amendment to the instant refund claim did no more than set forth facts and reasons why its claim for refund should be allowed. It complied with the existing regulations in setting forth under oath the facts *in support of the claim*. It did not constitute a claim *de novo*. On its face it shows and specifies that it was in support of, and in amplification of, its claim already on file, i. e., in support of the pending "action." For these reasons, the conclusion which petitioner attempts to draw from the cases cited in his brief, is a *non sequitur*. Those cases do not support his conclusion.

The same argument was made by petitioner to the Court below and is effectively answered in that Court's opinion at R. 24, *et. seq.* The fallacy of petitioner's argument is disclosed when it is remembered that the *issue* arising upon a refund claim is the overpayment of taxes for a specific year, and the amount thereof. That issue being raised by the claim, and being yet unheard and not considered, the claimant, under the regulations, filed a formal document in which "all the facts relied upon *in support of the claim*" were "clearly set forth under oath." The facts so filed were in support of the claim and bore upon and supported the issue raised by the claim

which had been theretofore filed. Certainly, the *issue* was never changed, and in his final determination the Commissioner passed upon that precise issue in light of the evidence submitted in support of the claim. *Maryland Casualty Co.* v. *U. S.*, 251 U. S. 342; *Thomas* v. *U. S.*, 22 F. (2d) 1000.

We have shown that the statute did not prescribe the contents of a refund claim and that until May 1, 1929, the regulations did not require the reasons to be set forth on the face of the claim, and that, therefore, the taxpayer was not required by law or regulations to plead all its reasons when it made its demand for refund.

But there is another reason why the refund claim filed by taxpayer on February 27, 1923, did not contain *on its face* all the facts and circumstances in support of the claim. This was not due to negligence or oversight. The claim sets forth on its face the reason why at that time it was unable to furnish the Commissioner all the grounds in support of its claim. The taxpayer explained that its 1917 taxes had not been finally passed upon by the Commissioner. That meant that its tax liability had not yet been determined. Until its tax liability had been determined the taxpayer could not know whether it had overpaid or underpaid its taxes. The time for protecting itself was about to expire, the Commissioner was engaged at that time in issuing additional assessments and in revoking them by certificates of overassessment. The taxpayer did not know, and could not know, whether or not the Commissioner would be able satisfactorily to determine its invested capital, and if so satisfactorily determined, whether or not its rate of tax, depending upon the adjustments to its net income and invested capital (both at that time undetermined), would entitle it to assessment under the special assessment provisions.

Application of the rule of reason here becomes apparent. Neither the law, nor the courts, demand the impossible of any one. The taxpayer did all it could do under the circumstances. Is it to be said the taxpayer must then have elected at its peril the grounds it would rely upon in support of its claim, when it was a legal and physical impossibility for it to ascertain what its grounds would be when the Commissioner had come to a conclusion as to its invested capital and net

income? Its time to file a refund claim was about to expire. It had to take some action to protect itself. If it then chose to elect to ask for a refund on the ground of special assessment, and thereafter the Commissioner had so adjusted its invested capital and net income that such relief would not be in order, then it would be liable to have its claim denied on the ground of "wrong reasons assigned." If it elected another ground, the result might have been the same. The Court below has seen this rule of reason and expressed it in its opinion:

> "We are of the opinion that the taxpayer may by amendment or amplification prior to action upon the claim for refund or rejection thereof by the Commissioner, bring to the Commissioner's attention the particular items of tax liability involved and set forth the detailed facts relied upon; and that a timely claim for refund may thus be amended prior to rejection even though a new or original claim might be barred by the statute of limitations. *Particularly is this true when at the time of filing the refund claim the Commissioner had under consideration the audit of plaintiff's tax liability for the year in question in connection with which no decision had been made and the amount of tax which the plaintiff might be called upon to pay had not been determined. Until this determination had been made plaintiff did not know what the basis of the Commissioner's final decision would be.*" (R. 23–24.) (Italics supplied.)

Upon the foregoing, and in light of the statute, the regulations and the reasons assigned by the Court below, it is submitted that respondent's refund claim was one susceptible of amendment and amplification.

UNDER GENERAL RULES OF STATUTORY CONSTRUCTION THE DECISION BELOW HEREIN SHOULD BE AFFIRMED.

Under the general rules of construction of statutes, so often enunciated by this Court, recovery was correctly allowed by the Court below.

The statutes under consideration are remedial and doubts

should be resolved in favor of the respondent in order to effectuate the remedy, while narrow and technical constructions should be avoided. If a substantial compliance with the statute can be found and if the Commissioner has been enabled to act intelligently on the claim and in knowledge of all pertinent facts, the decision of the Court of Claims should be affirmed.

Claims for refund are relief provisions to enable taxpayers to recover monies erroneously collected and illegally held by the Government. The provisions for refund claims were never intended as a means of preventing the repayment of such amounts. Such relief provisions should be construed so as to give the relief intended—not so as to prevent it. In *Bonwit Teller & Co.* v. *U. S., supra,* this Court, speaking to a similar point, said:

> The section is a part of a tax law giving to taxpayers opportunity to secure refund of overpayments that had become barred. Manifestly it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide.

The statute under consideration is part of the scheme of tax statutes. This Court has often recognized the rule that in case of doubt, such statutes must be construed in favor of the taxpayer, and has applied that rule to the provisions in taxing statutes relating to statutes of limitations. *U. S.* v. *Updike,* 281 U. S. 489, 496; *Bowers* v. *New York & A. Lighterage Co.,* 273 U. S. 346, 349–350.

NO NEW PRINCIPLE OF LAW IS INVOLVED HEREIN.

The instant case is not one of current importance. No apparent confusion exists in the decisions of the courts on the point at issue here. In principle, all of the courts are in harmony. No conflict exists among the decisions of the lower courts, or between those decisions and the decisions of this Court.

The principle involved is a settled principle. *Bonwit Teller & Co.* v. *U. S., supra, Tucker* v. *Alexander, supra,* and other cases cited *supra* herein.

The application of that principle must of necessity depend

on the facts arising in each case. The courts view the problem now as merely one of degree,—as the application of an established principle to the facts of a particular case.

The foregoing is clearly shown by an examination of the decision of the Circuit Court of Appeals, Second Circuit, in *Art Metal Construction Co.* v. *U. S.*, 47 Fed. (2d) 558, to which case petitioner refers on page 9 of his brief. Petitioner argues that the facts in that case are so nearly identical with those of the instant case as to render that decision in conflict with the decision herein. Such is not the case. The opinion in that case supports the position of respondent herein, and announces the same general principle as the other cases.

The *Art Metal Construction Co.* case was decided February 2, 1931. In that case it appears that the taxpayer filed a general claim for refund in the nominal amount of $1.00, without specifying the year for which claim was made or the amount claimed as erroneously collected. The Circuit Court of Appeals, Second Circuit, held that this was not a claim for refund but was merely a notice or warning that a refund claim might in the future be filed; that the supposed claim called for no action and was not susceptible of any action by the Commissioner; that it bore no evidence that the taxpayer had any present complaint in mind. The Court held that a claim subsequently filed for the year 1918 specifying the grounds therefor, but filed after the statutory period for filing, was not an amendment to the purported claim originally filed because the original document was not a claim at all but a mere notice that a claim would be filed.

The Circuit Court, in deciding the *Art Metal Construction Co.* case, in effect adopted the same principle laid down by the Court of Claims in the instant case. The Court clearly made its decision in the *Art Metal* case apply only to the facts of that case, and made clear that it recognized the distinction between a claim which was defective and insufficient, and a document which set forth no claim at all for any year or for any specific amount. This distinction is made apparent by the following statement of the Court (top p. 560):

> * * * We are not therefore dealing with a claim ineffectually couched, which advised the Commissioner

> that the taxpayer had come to doubt the validity of any part of the tax. *In such cases* we may assume arguendo that much latitude would be allowed, not only to amend as to the amount demanded, but to amplify the grounds of the claim, and perhaps to set out others. (Italics supplied.)

The foregoing language of the Court shows that the *Art Metal Construction Co.* decision is not in conflict with the decision in the instant case. Furthermore, the above language of the Court paves the way and leads up to that Court's further decisions on this point, which followed very soon thereafter.

On April 4, 1932, the same Court, speaking through the same Judge, rendered its decision in *McKesson & Robbins, Inc.*, v. *Edwards*, 57 Fed. (2d) 147 (in which reference was made to its earlier decision in the *Art Metal Construction Co.* case) and on the same day it rendered its decision in *Solomon* v. *U. S.*, 57 Fed. (2d) 150. One week later the same Court rendered its decision in *Henry Prentiss & Co., Inc.* v. *U. S.*, 57 Fed. (2d) 676.

An examination of the last mentioned cases will show that there is no conflict in the position of the Circuit Court of Appeals, Second Circuit, with that of the Court of Claims in the instant case.

In *McKesson & Robbins, Inc.* v. *Edwards, supra*, the Court found that the taxpayer timely filed a claim for refund which was insufficient in itself to support an action in court upon its rejection. Subsequently, and after the statutory period for filing claims had expired, taxpayer filed an amendment to its claim. The Commissioner considered the claim in light of the amendment and found an overpayment of tax. However, he refused to repay the amount so found overpaid and taxpayer instituted suit three days thereafter.

The Court held that there had been a compliance with the statute on the part of the taxpayer and that the suit could be maintained. The Court said, at page 149:

> So far as we can find, he [the Commissioner] was free to reconsider, and his decision was in abeyance until he had finished his deliberation * * *. The plaintiff had every

> ground for supposing that its claim, which was in fact under consideration at least until March 27, 1926, had not been finally rejected before * * *. Section 3226, Rev. St., like any other document, is to be read as sensible people would understand it * * *.

The Court further found that in its original claim the taxpayer had made a formal claim for a specific year and in the specific sum of $100,000, and that such claim stated no ground for its claim other than the phrase "amortization of war facilities." The Court held that this was an insufficient claim and did not satisfy the regulations, but that at least it was more than a mere caveat or warning that a claim would in future be filed; that the document did state, although defectively, that the taxpayer had a claim. The Court then held that in such a situation "the taxpayer may amend even though the amendment is filed after the period for filing has expired," provided such amendment is filed before the final action of the Commissioner. The Court pointed to the decided cases, and said:

> But the distinction between what will bear amendment and what will not, is common throughout the law; *it is no doubt one of degree*, like most else, but there seems no reason not to apply it here. (Italics supplied.)

The position of the same Circuit Court on this subject is further clarified by reference to its decision in *Solomon* v. *U. S.*, *supra*. There the taxpayer filed an insufficient claim for refund which was rejected, and the rejection scheduled. About two years later taxpayer applied to the Commissioner to have his case reopened to permit him to present a new ground for the allowance of the claim. The Commissioner refused to reopen the claim or to reconsider his rejection. The Court held that the amendment came too late when filed after rejection of the claim and that the Commissioner was within his rights to refuse to reopen the claim or reconsider his rejection upon the new grounds offered.

The same Court, in *Henry Prentiss & Co., Inc.* v. *U. S.*, *supra*, further clarifies its position. In the *Prentiss* case the

claimant filed claim asking for special assessment for the year 1918. Before action of the Commissioner in rejecting the claim, but after the period for filing claims had elapsed, the claimant amended its claim setting forth grounds for allowance of its claim which differed from those contained in the original claim. The Court held that the filing of the amendment before final action by the Commissioner was sufficient to advise the Commissioner of the grounds upon which the claimant relied and was sufficient predicate for maintaining its claim on the grounds set up in the amendment.

From the foregoing decisions it patently appears that there is not a conflict in decision between the instant decision and that of *Art Metal Construction Co., supra.* As the Court so clearly points out in the *McKesson & Robbins* case, the distinction between what will bear amendment and what will not bear amendment is one of degree only and the decision in each case must depend upon the factual aspects of each case.

The decision in the instant case is predicated upon the specific facts in this record and as such is clearly distinguished on its facts from the *Art Metal Construction Co.* case. It is a question of degree only and the Court of Claims in the instant case has determined that degree to be sufficient, just as did the Circuit Court, which decided *Art Metal Construction Co., supra,* on which the petitioner relies herein, and which said case was expressly referred to and distinguished by the same Circuit Court in *McKesson & Robbins, Inc., supra.* The same Court, one week later, again made a similar distinction in its decision in *Henry Prentiss & Co., supra,* and in effect followed its earlier decision in *McKesson & Robbins, Inc.*

The principle which arises out of all these cases is aptly stated by the Court of Claims in *Lancaster Cotton Mills* v. *U. S.*, 59 Fed. (2d) 270, and is consonant with the decisions above reviewed.

The clear distinction as to which claims may be amended and which may not, shown by the cases, may be summarized as follows:

> (1) Where a claim has been rejected, an amendment comes too late because there is nothing to amend.

(2) Where an amendment to a claim is made before the Commissioner has considered or acted upon a claim, and where the Commissioner considers and acts upon the claim as amended, with all of the facts and circumstances before him in so considering and acting upon the claim, his rejection of the claim will sustain an action for recovery of the refund upon the grounds set out in such amendment.

The decided cases involve the determination of the degree to which the established principle may be applied to the widely varying factual aspects of numerous cases. We believe it unnecessary to argue that this Court does not desire to be called upon to hear and decide every such case and to direct the application of an established principle to the many cases wherein there is involved only the degree to which the principle is applicable to specific facts.

Respondent repeats that the instant case involves no new principle nor does the decision below extend the established principle. It would appear that the effort of the petitioner in the instant case is to reverse and break down the sound and salutary *principles* announced by this Court in *Tucker* v. *Alexander*, *supra*, and in the *Eonwit Teller & Co.*, case, *supra*, by the process of attacking each *application* of that principle. In effect, it is an endeavor to whittle away the controlling principle by constantly repeated efforts at refinements and distinctions, so that in the end the principle itself may be lost, or become so emasculated as to be inoperative. The clear and vigorous language of this Court in the two cases last above referred to, gives hope that such an effort will not succeed. This Court was not speaking idly when it said that "the statute and regulations must be read in the light of their purpose" and that "the section is a part of a tax law giving to taxpayers opportunity to secure refund of overpayments that had become barred. Manifestly it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide." Claims for refund are designed to assist taxpayers to recover money wrongfully collected from them. They are not designed as "traps for the unwary."

THE CASES CITED BY PETITIONER DO NOT SUPPORT HIS CONTENTIONS HEREIN BUT, ON THE CONTRARY, TEND TO SUPPORT THE CONTENTIONS OF RESPONDENT.

Much of petitioner's brief, *in so far as it relates to the instant case,* is devoted to an attempt to show that *Bonwit Teller & Co.* v. *U. S., supra,* and *Tucker* v. *Alexander, supra,* are not applicable here, and to show that certain other cases support his position herein. Respondent believes that little argument is necessary to disprove this.

In *Bonwit Teller & Co.* v. *U. S., supra,* the issue was whether certain acts and things done by the claimant and the Commissioner amounted to an informal claim which would bear amendment after the statute had run; and particularly where it was shown that at the time the Commissioner made his determination of an overpayment he had all the facts and circumstances before him. The Government insisted that no timely claim for refund was filed by plaintiff. This Court viewed all the circumstances and held that the Commissioner had, in effect, treated the various documents as a claim; that he was not misled or deceived; that at the time he made his determination of overpayment the Commissioner had all the necessary information before him; that the Commissioner was fully advised of the grounds for plaintiff's claim before he made his determination; that there was a substantial compliance with the statute; and that relief measures intended to give taxpayers an opportunity to secure refunds of overpaid taxes should be liberally construed to give the relief intended to be provided.

Petitioner suggests in his brief that the situation in the instant case must have been in the mind of this Court when it used the language quoted at page 14 of his brief. A glance will show that the suggestion is not well taken. It appears from the report of the *Bonwit Teller case* that the Government did insist that no refund claim was timely filed but the Court held that the Commissioner's action, in effect, treated the earlier documents as sufficient and that this treatment was warranted. But the suggestion is not applicable in any way to the

instant case. It can not be truly said that the Commissioner considered that the filing of the claim of February 27, 1923, did not constitute the filing of a claim. The very language of the Commissioner refutes the suggestion. The Commissioner makes specific reference to the refund claim in his letter of January 13, 1927, wherein he states:

> "With reference to the amount of the overassessment shown above which is outlawed, you are advised that *your claim for refund filed February 27, 1923*, or within the period of time allowed for the filing of claims, does not outline or specify an application for relief under the provisions of section 210 of the revenue act of 1917, and your claim for refund filed July 18, 1925, *amplifying the former claim* and outlining an application under section 210, was not filed within the statutory period." (Italics supplied.)

From the foregoing it would indeed appear strained for the Government to argue that the Commissioner refused to make this refund because no claim was filed. In the above quotation of one full sentence the Commissioner twice refers to the "former" claim "filed on February 27, 1923" and in the same sentence refers to the amplification of *that claim*.

Again, in the Certificate of Overassessment issued by the Commissioner to the taxpayer (see Appendix B to petitioner's brief), the Commissioner stated:

> "An audit of your income-tax return, Forms 1031 and 1120 and a consideration of all the claims (if any) filed by you for the year 1917 indicates that the tax assessed for this year was in excess of the amount due.
>
> Previously assessed:

Original, Account #8751475	$177,338.72
Additional, May, 1920, Page 19, Line 5	267.32
Additional, August, 1920, Page 10, Line 4	25,321.91
Total assessed	202,927.95
Tax liability	166,999.17

Overassessment indicated	35,928.78
Less: Overassessment, Schedule 7222	3,293.89
Balance	32,634.89
Overassessment outlawed	19,995.44
Overassessment allowable	12,639.45"

The foregoing constitutes the account stated. The self-serving declaration by the Commissioner that a portion of the account stated is subject to a defense under the statute does not change the nature of the account. The account remains the account stated.

Tucker v. *Alexander*, 275 U. S. 228, lays down the general rule which must govern. That general rule is a sound and reasonable one which aptly applies in the instant case. The Court said:

> The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery.

After making the foregoing statement, this Court gives its reasons as follows:

> If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose.

Petitioner's argument on *Tucker* v. *Alexander* is beside the point. In the instant case, the Commissioner accepted the sworn facts filed in support of respondent's claim and thereafter proceeded to consider and determine the claim in light of

the evidence so submitted. In doing this he was not waiving a compliance with the statute. The statute does not make it necessary to state on the face of the claim all the facts in support of the claim. Likewise, the Commissioner's own regulations contained no such requirement. This case does not involve the waiver of a statutory provision. Neither does it involve the waiver of the provisions of a regulation. But, even though it involved the waiver of a regulation, the Supreme Court has held that such regulations may be waived by the Commissioner in circumstances similar to those herein involved.

Petitioner calls attention to other decisions which he suggests are contrary to the decision below in the instant case. A brief analysis of each of them will show that such decisions are not contrary to the instant decision, but are consonant with and support the general principles upon which this case was decided below.

U. S. v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. In that case claimant filed refund claim stating special assessment as the sole grounds in support thereof. Hearings were had and briefs filed and considered on that point. Upon partial rejection of the claim, suit was filed in the Court of Claims and an entirely new ground for refund was set up *in that suit. This new ground had never been presented to the Commissioner* at any stage of the consideration of the claim by him. Claimant contended that it would have been futile to present this new matter to the Commissioner because the Commissioner would surely deny it. The Court of Claims held that the claim was good because claimant was not called upon to do a futile thing. This Court held that the Commissioner was entitled to be informed of any ground upon which claimant relied, and that since the Commissioner had no knowledge of such new grounds, he could not have taken action with respect to it, and consequently there could not have been a waiver of a technical requirement because the Commissioner could not waive that of which he had no knowledge.

The decision of this Court was predicated upon a factual situation diametrically opposite to that in the instant case. In the instant case the Commissioner had all the facts *before*

him before he took up the claim for consideration. The claim had been amended before any hearing or consideration had been had in the case. The Commissioner was fully advised and acted in light of all the facts. The *Felt & Tarrant Mfg. Co.* case tends strongly to support the decision in the instant case, and offers no support for the petitioner's position herein.

Art Metal Construction Co., supra, referred to by petitioner at page 9 of his brief, has been discussed herein, and has been shown to have no adverse bearing on respondent's position herein. It has been pointed out, on the contrary, that that case makes the very distinction for which respondent contends, *viz.*, that the application of the recognized general principle is one of degree only.

Zeller v. *U. S.*, 46 F. (2d) 1023 (C. C. A. 2d) reversed the lower court (35 F. (2d) 870) and in a short *per curiam* decision held that the case presented only variations in fact from *Art Metal Construction Co.* v. *U. S., supra,* which did not justify a different decision, and that the facts were even stronger for the defendant than in the former case.

We have pointed out hereinabove that there is no basis for contending that the Commissioner's action on taxpayer's abatement claim constituted a rejection of its refund claim. This renders pointless the reference to the cases cited by petitioner at bottom of page 9 of his brief. However, we would call attention to the fact that those cases, in their statement of the general rule and principle governing this line of cases, sustain and support the decision below in the instant case. We shall briefly point out the factual differences which distinguish them here.

Solomon v. *U. S.*, 57 F. (2d) 150 (C. C. A., 2d), has been discussed above. It decided that the amendment came too late after the Commissioner had rejected the claim and after he had refused to reopen or reconsider his rejection.

Jonesboro Grocer Co. v. *U. S.*, 66 C. Cls. 320, decided that where a refund claim had been rejected by the Commissioner in 1921, a refund claim filed approximately three years later, and which did not purport to be an amendment or amplification

of the former claim, and which was filed after the statute had run, was not a sufficient claim to support the action.

Mutual Life Insurance Co. v. *U. S.*, 49 F. (2d) 662, 72 C. Cls. 204, deals with a situation in which a refund claim was considered and disallowed by the Commissioner in 1927. More than a year thereafter an application was filed *requesting that the claim be reopened* and reconsidered and allowed on an entirely new basis. This the Commissioner refused to do. The Commissioner held that the grounds set up in the application to reopen did not support the action.

The Court, in *Bemis Bros. Bag Co.* v. *U. S.*, 60 F. (2d) 944 (C. C. A., 8th), decided that an amendment to a claim made after the rejection by the Commissioner, came too late.

We summarize by stating that none of the above cases is authority for a reversal of the Court below in the instant case. All of them are in accord with the general principle for which respondent contends.

At page 11 of his brief, petitioner argues, in effect, that the decision in the instant cause is wrong because (as he contends) some of the reasoning of the Court below is in error. To this respondent observes that if the decision herein is right it may not be reversed, even though this Court should be of opinion that some or all the reasons given for the decision are wrong.

To his brief, petitioner has appended reprints of two recent decisions of the Court of Claims, *Electric Power & Light Corporation* v. *U. S.*, and *Johnson* v. *U. S.*, both decided November 14, 1932. Both of these cases appear to bear specifically on the decision of the Court below in *Memphis Cotton Oil Co.* v. *U. S.*, 59 F. (2d) 276, which case is now pending on writ of *certiorari* at this present term of this Court. Respondent is not aware why these cases are appended to or discussed in petitioner's brief in the instant case. The *Memphis Cotton Oil* case will be argued at this term and possibly on the same day with the instant case. The *Memphis Cotton Oil Company* is represented by able and learned counsel who will present that case to this Court. The *Memphis Cotton Oil* case decision is not determinative of the issue in the instant case. It arises upon a different state of facts from that to be found in the instant record. The instant cause stands upon its own facts

and respondent herein respectfully refers this Court to the briefs and argument in that cause for a decision in that cause. Respondent has not sought to brief that cause.

CONCLUSION.

The decision of the Court of Claims is a just and proper decision and should be affirmed.

Respectfully submitted,

J. GILMER KÖRNER, JR.,
Attorney for Respondent.

JOSEPH J. KLEIN,
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Of Counsel.
November, 1932.

APPENDIX A.

STATUTES AND REGULATIONS INVOLVED.

Sections 252, 1316, and 1318, of the Revenue Act of 1921, c. 136, 42 Stat 227, 268, 314, as amended by Act of March 4, 1923, c. 276, 42 Stat. 1504, 1505, provide in part:

> SEC. 252. (a) That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1917, * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer, or unless before the expiration of two years from the time the tax was paid a claim therefor is filed by the taxpayer.
>
> SEC. 1316. That Section 3228 of the Revised Statutes is amended to read as follows:
>
> "SEC. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."
>
> This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.
>
> SEC. 1318. That section 3226 of the Revised Statutes is amended to read as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a

claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

This section shall not affect any suit or proceeding instituted prior to the passage of this act, but shall apply to all suits and proceedings instituted after the passage of this Act, whether or not barred by prior Acts of Congress.

Section 284 (b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, provides:

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Article 1036, Treasury Regulations 62, promulgated under the Revenue Act of 1921, provides:

ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under

oath. In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary, or other similar evidence, must be annexed to the claim to show the authority of the administrator or executor. The affidavit may be made by an agent of the person assessed, but in such a case a power of attorney must accompany the claim. Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and shall, unless otherwise directed, be sent directly to the proper persons. The Commissioner has no authority to refund on equitable grounds penalties legally collected. As to claims for refund of sums recovered by suit see article 1051.

Treasury Decision 4265, C. B. VIII–1, page 110, approved by the Secretary of the Treasury on March 27, 1929, amending existing regulations, provides as follows:

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

APPENDIX B.

[Claim executed on Treasury Dept. Form 843 and filed February 27, 1923.]

CLAIM FOR
ABATEMENT OF TAX ASSESSED
CREDIT AGAINST OUTSTANDING ASSESSMENTS
REFUND OF TAXES ILLEGALLY COLLECTED
REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

Stillwater Worsted Company, Inc., Harrisville, R. I.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statements are true and complete.

	Period	Year
	From: Jan. 1	1917
	To: Dec. 31	1917
1. Business in which engaged: Manufacturing worsted goods.		
2. Character of assessment or tax: Income and excess-profits tax.		
3. Amount of assessment or stamps purchased		$177,606.04
4. Reduction of tax liability requested (income and profits tax)		$177,606.04
5. Amount to be abated		$
6. Amount to be refunded (or such greater amount as is legally refundable)		$177,606.04
7. Dates of payment (see collector's receipts or indorsements of canceled checks): June 15, 1918–June 30, 1920. (If statement cover income-tax liability, items 8–11, inclusive, must be answered.)		
8. District in which return (if any) was filed: Providence, R. I.		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked; period from ..... to		$

Deponent verily believes that this application should be allowed for the following reasons:

Claimant's taxes for 1917 have not been finally passed upon by the Commissioner of Internal Revenue. This claim for refund is filed in order to save taxpayer's rights under the pertinent statutes governing abatements, credits, and refunds of income and excess-profits taxes of 1917, and to permit the commissioner to refund to deponent any excess paid over taxes actually found to be due.

APPENDIX C.

[Amplification of Claim executed on Treasury Dept. Form 843 and filed July 17, 1925.]

CLAIM FOR
ABATEMENT OF TAX ASSESSED
CREDIT AGAINST OUTSTANDING ASSESSMENTS
X REFUND OF TAXES ILLEGALLY COLLECTED
REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

STATE OF NEW YORK,
County of New York, ss:

Factors and Finance Co., Inc. (formerly Stillwater Worsted Co., Inc.), 257 Fourth Avenue, New York, N. Y.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete.

	Period From: Jan. 1 To: Dec. 31	Year 1917 1917
1. Business in which engaged: Manufacturing worsted goods.		
2. Character of assessment or tax: Income and profits taxes.		
3. Amount of assessment or stamps purchased		$177,606.04
4. Reduction of tax liability requested (income and profits tax)		$177,606.04
5. Amount to be abated		$
6. Amount to be refunded (or such greater amount as is legally refundable)		$177,606.04
7. Dates of payment (see collector's receipts or indorsements of canceled check): statutory due dates. (If statement covers income tax liability, items 8–11, inclusive, must be answered.)		
8. District in which return (if any) was filed: Providence, R. I., or Hartford, Conn.		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked: period from ..... to		$

Deponent verily believes that this application should be allowed for the following reasons:

Before the tolling of the statute of limitations for 1917 taxes and on or about February 27, 1923, taxpayer filed a 1917 refund claim for the full amount of the 1917 tax paid, $177,606.04, and this document is merely the amplification of said claim, setting forth the details in the matter.

Taxpayer hereby makes application for assessment under the provision of section 210 of the revenue act of 1917 for the

reasons set forth in the attached sheets, and respectfully requests the tax adjustments shown thereon.

Statement attached to the 1917 refund claim of taxes of Factors and Finance Co., Inc. (formerly Stillwater Worsted Co., Inc.), 257 Fourth Ave., New York, N. Y.

REASONS:

(A) Taxpayer respectfully states that, if the tax is determined without the benefit of section 210, owing to certain abnormal conditions, it will work exceptional hardship upon the taxpayer, evidenced by the gross disproportion between the tax computed without the benefit of this section, and the tax computed by reference to the representative corporations specified in section 210. The abnormalities claimed are clearly indicated by the following percentages, which show a 104.8% return on investment, and a profits tax payment of 48.4% of its net income:

(a)	Invested capital	$369,954.27
(b)	Net taxable income	387,706.57
(c)	Excess and war profits taxes	187,629.43
(d)	Income taxes	12,004.63
(e)	Total tax	199,634.06
(f)	% which (b) is of (a)	104.8
(g)	% which (c) is of (a)	50.7
(h)	% which (c) is of (b)	48.4

FACTS:

(B) The reasons set forth in (A) above are predicated on the following facts, which compare taxpayer's 1917 tax data with that of representative concerns:

Statement attached to the 1917 refund claim of taxes of Factors and Finance Company, Inc. (Formerly Stillwater Worsted Company, Inc.), 257 Fourth Avenue, New York, N. Y.

	(a) Invested capital	(b) Net taxable income	(c) Excess and war-profits taxes	(d) Total taxes	% which (b) is of (a)	% which (c) is of (a)	% which (c) is of (b)
Taxpayer	$369,954.27	$387,706.57	$187,629.43	$199,634.06	104.8	50.7	48.4
Montrose Woolen Co.*			136,066.34	144,335.76			49.6
Montrose Woolen Co.†	237,562.94	274,258.06	88,899.73	99,999.15	115.4	37.4	32.4
Merion Worsted Mills					28.6		20.7
Empire Worsted Mills					30.0		23.0
American Association of Woolen and Worsted Mfrs. (compilation average)					43.1		2.79

*Before being granted relief under section 210.
†After being granted relief under section 210.

DESCRIPTION OF BUSINESS:

(C) The business of the Stillwater Worsted Co., Inc., was the manufacture and sale of men's worsted merchandise in the piece. The operations of this concern, during 1917, began with the purchase of yarn and proceeded thence with weaving and the various other processes required for the manufacture thereof into finished worsted goods in the piece.

INVESTED CAPITAL, ETC.:

(D) The Stillwater Worsted Company, Inc., ceased business operations at the end of 1911, and liquidated all of its assets and liabilities and retired all of its stock with the exception of eight (8) shares of common stock which were left for the purpose of keeping the corporation alive as an entity. The shell of the corporation continued thus through the years 1912, 1913, and 1914, the company during that entire period being quiescent and doing no business, of any nature, whatever. On January 1, 1915, the corporation again started operations, obtaining new capital, and continued uninterruptedly thereafter until December, 1919.

The annual net income and invested capital of the company, as determined by the department, is as follows:

Statement attached to the 1917 refund claim of taxes of Factors and Finance Company, Inc. (formerly Stillwater Worsted Company, Inc), 257 Fourth Avenue, New York, N. Y.

Year	Net Income	Invested capital
1911	$9,752.88	$66,673.72
1912	None.	800.00
1913	None.	800.00
1914	None.	800.00
1915	73,289.75	65,811.51
1916	187,330.36	171,009.79
1917	387,706.57	369,954.27

(E) The company did not have any governmental cost-plus contracts.